IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-01425

RONNIE E. NOBLIN, HENRY C. NOBLIN, JR.,
THOMAS G. NOBLIN, ROBBIE NOBLIN,
NELL NOBLIN JOHNSON, DIANE BOYKIN,
AND JOYCE MILLER — PLAINTIFFS-APPELLANTS

VS.

SAMMY J. BURGESS AND SHEILA MCDILL — DEFENDANTS-APPELLEES

IN RE: Appeal from the Circuit Court of Smith County, Mississippi
Cause No. 2007-130

BRIEF FOR THE APPELLEES, SAMMY J. BURGESS AND SHEILA MCDILL

Oral Argument is Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1.	Ronnie Noblin	Plaintiff/Appellant
2.	Thomas C. Noblin	Plaintiff/Appellant
3.	Robbie Noblin	Plaintiff/Appellant
4.	Nell Noblin Johnson	Plaintiff/Appellant
5.	Diane Boykin	Plaintiff/Appellant
6.	Joyce Miller	Plaintiff/Appellant
7.	Sammy J. Burgess	Defendant/Appellee
8.	Sheila McDill	Defendant/Appellee
9.	Eugene C. Tullos	Attorney for Plaintiffs/Appellants
10.	G. David Garner	Attorney for Plaintiffs/Appellants
11.	William F. Goodman, Jr.	Attorney for Plaintiffs/Appellants
12.	Lewis W. Bell	Attorney for Plaintiffs/Appellants
13.	Mark K. Tullos	Attorney for Defendants/Appellees
14.	Honorable Robert G. Evans	Circuit Court Judge, 13th Judicial District

Respectfully submitted,

MARK K. TULLOS, ATTORNEY FOR
DEFENDANTS/APPELLEES

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STATEMENT OF THE ISSUES

Plaintiffs/Appellants (hereinafter referred to as "Contestants") herein have appealed an 11-1 jury verdict in favor of the Defendants/Appellees (hereinafter referred to as "Sammy and Sheila") confirming the Last Will and Testament of Robert H. Noblin (hereinafter referred to as "Bob"). The primary issues before this Court are as follows:

1. Was the trial court correct in granting a directed verdict in favor of Sammy and Sheila on the issue of testamentary capacity?
2. Did the trial court properly instruct the jury?
3. Did Sammy and Sheila overcome their burden of proof by clear and convincing evidence that they did not exert undue influence on Bob?

STATEMENT OF THE FACTS

This case involves a Will contest filed by only seven (7) of at least twenty-one (21) heirs at law of Bob Noblin, who died of cancer the morning of October 3, 2003. Failing to propound any discovery during the three years this case had been pending; failing to timely designate experts; disregarding the Chancellor's order compelling discovery and failing to answer discovery; the contestants are now asking this Court to reverse the trial court's entry of judgment in favor of Sammy and Sheila and to give them a "do over," or better yet, disregard the evidence as well as the verdict of the jury and render a verdict in contestants' favor.

Bob Noblin was raised in the Homewood Community on the Smith-Scott County line. Bob had lived with his mother, Geneva, and disabled brother, Mac, until their deaths. (Tr. 331). Bob was a very independent person who was described by the contestant, Dianne Boykin, as "one-way Bob", it was his way or no way. (Tr. 281). After Bob's mother and brother passed away, Bob married Frances Burgess in 1982. (Tr. 152). This was Bob's first and only marriage.

Frances had two children from a previous marriage, Sammy Burgess and Sheila McDill, the proponent's herein.

During Bob's lifetime, he worked as an inspector for the USDA in several poultry plants in Scott County. (Tr. 277). Bob was also a cattle farmer on approximately 500 acres of land situated in Smith and Scott Counties he had purchased over the years. (Tr. 236, 246-51). Contestants allege that this land consisted of the "family farm" and "Noblin land." (Appellants Brief p. 6). The truth of the matter is that Bob had purchased all of his land from third parties and it never consisted of any "family farm" or "Noblin land." (Tr. 246-62). The only land that Bob owned that might be considered "Noblin land" was 1.75 acres that he was awarded by the Smith County Chancery Court in a lawsuit filed against him by the contestant, Henry C. Noblin, Jr.'s, father in 1977. (Tr. 254-57; R.E. 1, 2). Instead of being referred to as "Noblin land," this land should be referred to as "Bob Noblin land."

Bob did not have any children of his own, however, he became very close to Sammy and Sheila after his marriage to Frances. (Tr. 241, 372). Bob and Frances moved to Frances's home on Scott Drive in Forest, Mississippi, which was two houses away from Sheila's home and a couple of blocks from Sammy's home. (Tr. 420). Bob and Frances lived in this home as husband and wife until Frances's death on July 20, 1994. (Tr. 151, 283). After Frances's death, Bob continued to live on Scott Drive and continued his 21 year relationship with Sammy and Sheila. (Tr. 421-22). Bob continued to celebrate Christmas, Thanksgiving, birthdays, Father's Day, and other occasions with Sammy, Sheila and their families after the death of Frances. (Tr. 421-22). In 2001, Sammy and his wife divorced and Sammy moved into his mother's home on Scott Drive with Bob. (Tr. 388). Bob treated Sammy and Sheila just like his son and daughter and even referred to them as his son and daughter. (Tr. 334, 372). Sammy and Bob especially

enjoyed spending time together and had planned and worked together on many projects on Bob's land. (Tr. 369-72).

As a testament to his relationship to Sammy and Sheila, Bob named them as his beneficiaries under all of his IRA accounts and certificates of deposit at Community Bank. (Tr. 315-16, 318-19). Bob also listed Sammy and Sheila as his "son" and "daughter" on the IRA applications. (Tr. 316; R.E. 3). As additional proof of Bob's relationship with Sammy and Sheila, Bob ordered a tombstone in 1994 from Davidson Marble Company that had the word "Father" carved above his name. (Tr. 359; R.E. 4).

In 2003, Bob began having breathing problems and thought he had pneumonia. (Tr. 390). Bob was reluctant to go to a doctor, but Sammy had to go see Dr. John Paul Lee for a shot and asked Bob to ride with him. (Tr. 390). Dr. Lee ran several tests on Bob and advised that he would call with the results. (Tr. 391). Later that evening or the next morning, Dr. Lee called Sammy and advised Sammy to take Bob to Lackey Hospital in Forest. (Tr. 391). On the morning of September 24, 2003, unknown to Bob, he left his home for the final time and was admitted to Lackey, where several more tests confirmed that Bob had metastatic liver cancer. (Tr. 194). Bob remained hospitalized at Lackey until September 29, 2003 at which time Bob requested to go to Baptist in Jackson for a second opinion. (Tr. 158-59). On September 29, 2003, Sammy drove Bob to Baptist Hospital in Jackson. (Tr 158-59). Upon arrival at Baptist, Bob got car sick as a result of the ride from Forest to Jackson. (Tr. 393). Sammy filled out the admission forms for Bob because Bob was throwing up from being car sick. (Tr. 393). Bob was admitted to the oncology unit at Baptist Hospital.

By October 1, 2003, Bob realized that there was no hope and that he was going to die. (Tr. 426). Also on October 1, 2003, plans were being made to move Bob to hospice care. (Tr.

427). Around 10:00 a.m. on the morning on October 1, 2003, Bob asked Sammy to call Todd Sorey, an attorney from the Homewood Community, for the purpose of preparing a will. (Tr. 394). Todd not only knew Sammy and most of the contestants, but had known Bob for many years, having been raised within seeing distance of Bob's house. (Tr. 121-22).

Todd testified that Sammy had called him on the morning of October 1, 2003 and advised that Bob wanted Todd to draw up a will. (Tr. 124). It was at that time Todd learned that Bob was hospitalized at Baptist. (Tr. 124). Due to the fact Bob was hard of hearing over the phone, Todd relayed his questions through Sammy. (Tr. 124-25). Todd heard Bob's responses to each question over the phone, knowing the tone, vernacular, and accent of Bob's voice. (Tr. 125). Based upon this phone conversation, Todd prepared the will according to Bob's wishes. (Tr. 127, 129). Due to the fact Todd was going to be leaving out of the office that afternoon for a couple of days, Todd gave Sammy instructions for someone to come by his office and pick up the will. (Tr. 129).

On the morning of October 2, 2003, while on her way to Baptist, Sheila stopped by Todd's office and picked up the will and affidavits that Todd had prepared. (Tr. 424). Sheila took these documents to Bob's room at which time Bob put on his reading glasses and read the will. (Tr. 424). Nurse Lynn Thornton, a nurse in the oncology department at Baptist, was also in the room and she was asked if she could find another person to witness Bob signing the will. (Tr. 424). Nurse Thornton left the room and found Nurse Corley Callum and asked if she would witness the signing of Bob's will. (Tr. 89). Gail Young, a notary that worked in the business office at Baptist, was also called to come to Bob's room. (Tr. 115). Nurse Callum, Nurse Thornton, and Gail Young all witnessed Bob sign his will. (Tr. 97, 115).

Nurse Callum worked as an RN in the oncology department of Baptist Hospital on

October 2, 2003. (Tr. 87). Nurse Callum's duties and responsibilities in the oncology department were daily patient care, daily assessments of patients, and administration of chemotherapy. (Tr. 87). Nurse Callum also performed mental status assessments on patients. (Tr. 87). Nurse Callum agreed to be a witness and recalled going into Bob's room where he was seated on the bed with the will on a table in front of him. (Tr. 90, 96). Nurse Callum had a conversation with Bob and asked how he was doing and verifying what was taking place (signing the will) was what he wanted to do. (Tr. 91). Nurse Callum satisfied herself that this was Bob's wishes and that he did not appear to be under the influence of any drugs at the time. (Tr. 91). Nurse Callum read the will as well as the affidavits prior to Bob signing the will. (Tr. 96, 99). Furthermore, Nurse Callum satisfied herself that Bob was of sound and disposing mind and memory at the time he executed the will based upon the conversation that she had with Bob and that she would not have signed her name to the will if she were not satisfied of this fact. (Tr. 99-100). Nurse Callum further satisfied herself that the will represented the intent of Bob at the time he executed the will. (Tr. 110). Nurse Callum went as far as testifying that she would not sign her name to any document that she felt was deceitful and she made her own judgment of Bob's mental status based upon the questions she asked Bob. (Tr. 111). Nurse Callum finished her testimony by stating that she felt like she was upholding Bob's wishes that day. (Tr. 112).

Dr. Grace Shumaker was Bob's treating physician at Baptist and was qualified by the contestants as an expert in oncology. When presented with Bob's medical records, Dr. Shumaker was unable to give any opinion as to Bob's mental status as of the date that he signed the will. (Tr. 230). Dr. Shumaker stated that she would defer to Nurse Callum's mental assessment of Bob for that determination. (Tr. 230).

Bob executed his will on October 2, 2003 between 12:00 p.m. and 2:00 p.m. (Tr. 175-

76, 398, 462). Bob had no complaints of pain until 2:00 p.m. on October 2, 2003, and then it was only generalized pain. (R.E. 5). Bob did not have any pain medications on October 2, 2003 between the hours of 8:30 a.m. and 2:00 p.m. (R.E. 5). Bob had not been taking morphine because he was allergic to it. (Tr. 221). Dr. Shumaker did indicate that Bob was lethargic on October 2, 2003, however, she also indicated that Bob was easily aroused and would wake up and talk to the nurses. (Tr. 212).

Around 6:00 p.m. on October 2, 2003, Bob insisted that he sit on the side of the bed, and with assistance, he was positioned on the side of the bed. (R.E. 6). Around 7:00 p.m. Bob had a change in his condition. (R.E. 6). Bob became unresponsive around 12:05 a.m. and died at 12:10 a.m. on October 3, 2003. (R.E. 6).

SUMMARY OF THE ARGUMENT

The Court was correct in granting a directed verdict in Sammy and Sheila's favor on the issue of testamentary capacity. Contestants produced no evidence to contradict Sammy and Sheila's evidence of testamentary capacity. Despite what Bob's mental and physical condition was prior to or after the execution of his Will, the controlling question is his testamentary capacity at the time he executed the Will. In *Hayward v. Hayward,* 299 So. 2d 207 (Miss. 1974), the Court stated the following:

> When assembled apart from other conduct and dissociated from those periods of calm and discretion which all witnesses for the contestants conceded, they could constitute an impressive challenge. However, this testimony fails to establish the fact that ***at the crucial moment*** when evidence of testamentary capacity attains its maximum and controlling relevancy, that is, ***at the time of the will's execution,*** there was any lack of capacity to appreciate the nature and effect of his act and the natural objects of his bounty.

Hayward, 299 So. 2d at 209-10 (citations omitted).

Contestants called no witnesses or offered any proof to contradict Sammy and Sheila's

evidence as to Bob's testamentary capacity at the time the will was executed. Contestants did offer the testimony of Dr. Grace Shumaker, which consisted primarily of testifying about certain portions of the medical records during Bob's hospitalization, none of which were at the time Bob signed his will. Contestants failed to inquire of Dr. Shumaker or ask the one crucial question relevant to the issue of testamentary capacity at the time the will was executed. Counsel for Sammy and Sheila, however, did ask this question of Dr. Shumaker, who testified that she could not give an opinion and would defer that determination to the nurses at Baptist who had assessed Bob at that particular time. Sammy and Sheila called Nurse Callum, a subscribing witness to the will and a nurse in the oncology department at Baptist Medical Center, who testified that Bob understood what he was doing and that he had testamentary capacity at the time he executed the Will. The Court in *Smith v. Averill,* 722 So. 2d 606 (Miss. 1998) held that "[w]hen weighing all the testimony, this Court has held that it is easiest for subscribing witnesses to tip the scales toward capacity. *Smith,* 722 So. 2d at 611.

Even assuming Bob had experienced episodes of disorientation prior to, and after executing the Will, the evidence supports the Court's granting of a directed verdict in favor of proponents on the issue of testamentary capacity. In *Hayward,* the Court found that "[a]ssuming that there were detached incidents of conduct suggesting aberration, the establishment of intervals of unquestioned lucidity, during one of which the will was executed, so far outweighs the inferences from isolated instances of eccentric deviations as to depreciate such instances below a substantial probative value." *Hayward,* 299 So. 2d at 210. Likewise, in *Smith v. Averill,* the Court held that ". . . although a testator may not possess capacity one day, the next week he may have a lucid interval in which he has the capacity to execute a valid will. *Id.* 722 So. 2d at 611. The testimony of Nurse Callum, without any contradictory testimony or evidence,

supports a directed verdict on the issue of Bob's testamentary capacity.

The jury in the present case was properly instructed on confidential relationship, presumptive undue influence, and undue influence. The jury was also instructed, pursuant to contestants' instructions C15 and C8, that Sammy and Sheila had to show from the clear and convincing evidence that they did not exert undue influence over Bob at the time he executed his will, and therefore, there was no prejudicial error.

Sammy and Sheila exhibited good faith; Bob acted with knowledge and deliberation when he executed his will; and Bob exhibited independent consent and action. Nurse Callum, a registered nurse trained and experienced in performing physical and mental assessments, spoke with Bob prior to signing the will and satisfied herself that, among other things, (a) Bob understood what he was doing, (b) that what was contained in the will was what Bob wanted, and (c) she did not feel as if there was any deceit taking place, and she felt as though she was upholding Bob's wishes.

Furthermore, Bob named Sammy and Sheila as beneficiaries under 3 separate certificates of deposit established by Bob at Community Bank of Mississippi. Bob listed Sammy and Sheila as his "son" and "daughter" on the applications for these certificates of deposit just as he did in his will. Furthermore, Sammy and Sheila were able to show that their relationship with Bob was liken to a father, and that Bob had the word "Father" carved above his name on his tombstone which clearly reflected his true relationship with the proponents.

The jury determined that Sammy and Sheila did not exert undue influence, presumptive or otherwise, on Bob by the clear and convincing evidence, and therefore, the verdict should be affirmed.

ARGUMENT

I. The Trial Court Was Correct In Granting A Directed Verdict In Favor Of The Proponents On The Issue Of Testamentary Capacity.

To determine testamentary capacity, the Court considers the following 3 factors:

1. Did the testat[or] have the ability at the time of the will to understand and appreciate the effects of [his] act?

2. Did the testat[or] have the ability at the time of the will to understand the natural objects or persons to receive [his] bounty and their relation to [him]?

3. Was the testat[or] capable to determining at the time of the will what disposition [he] desired to make of [his] property?

See *In re Estate of Holmes,* 961 So. 2d 674, 679 (Miss. 2007), citing *Smith v. Averill,* 722 So. 2d 606, 610 (Miss. 1998).

In the present case, after the close of the contestants case in chief, Sammy and Sheila moved for a directed verdict on the issue of Bob's testamentary capacity. (Tr. 296-308). After hearing argument from counsel for all parties, the trial court granted Sammy and Sheila's motion for a directed verdict on the issue of testamentary capacity based upon the evidence presented by Sammy and Sheila and the lack of evidence presented by the contestants, as well as this Court's ruling in *Hayward v. Hayward,* 299 So. 2d 207 (Miss. 1974). (Tr. 433-34).

In *Forbes v. General Motors Cop.,* 935 So. 2d 869 (Miss. 2006), this Court outlined the standard of review on directed verdicts:

> Our standard of review for a directed verdict is clear. This court will consider the evidence in the light most favorable to the non movement, giving that party . . . the benefit of all favorable inferences that may be reasonably drawn from the evidence. We must decide if the facts so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict. Thus, if reasonable jurors could not have arrived at a different verdict, the grant of a directed verdict must be affirmed on appeal. On the other hand, if there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, we cannot affirm the grant of a directed

verdict.

Forbes v. General Motors Corp., 935 So. 2d 869, 872 (Miss. 2006), citing *Cousar v. State*, 855 So. 2d 993, 998 (Miss. 2003).

The contestants argue that there are conflicts in the record concerning Bob's mental capacity precluding a directed verdict, and therefore the jury should have been given an opportunity to weigh that evidence and the credibility of accounts of the testator's mental state.

The facts concerning testamentary capacity in the present case are very similar to those in *In re Estate of Pigg*, 877 So. 2d 406 (Miss. Ct. App. 2003), In *Estate of Pigg*, the testator suffered several emotional and physical problems, breast cancer, gastrointestinal bleeding, and severe back problems. A witness called by the contestants who visited the testator while she was hospitalized testified that testator was on many medications and experienced hallucinations prior to executing the will. *Estate of Pigg*, 877 So. 2d at 410. Contestants also called Dr. Blaylock, who testified that "someone who had that many multiple problems . . . I'm not sure that they would be thinking rationally." *Id.* at 410. Dr. Blaylock offered no opinion as to testator's actual mental status on the date the will was executed. *Id.*

The Court in *Estate of Pigg* found that, at the close of their case, the contestants had produced no evidence that testator failed to have sufficient mental capacity on the critical date of April 10, 1997, being the date the will was executed, and that a directed verdict should have been entered in favor of the proponents. *Id.*

In the present case, the contestants produced Bob's medical records which indicated that Bob ate very little food, was on pain medication "off and on" during the three days at Baptist, he was confined to his room and his bed, and that "[o]n October 1, 2003, the day before the purported will was executed, Bob Noblin was hallucinating and hearing voices. . . ." (See Appellants' Brief, p. 35). According to the partial medical record copied and contained in

Appellants' brief, just after midnight on October 1, 2003, Bob became confused and was hallucinating and hearing voices after receiving a dose of Phenergan. (See Appellants' Brief, p. 35).

The medical records dated October 2, 2003, the day Bob signed his will, paint a different picture. While Bob was lethargic, he was easily aroused and would easily wake up and talk to the nurses. (Tr. 212). Additionally, Bob had not been on any pain medication between the hours of 8:30 a.m. and 2:00 p.m. on October 2, 2003. (Tr. 212; R.E. 5). Bob wasn't experiencing nausea and his pain was controlled fairly well. (Tr. 200, 211; R.E. 5). As a matter of fact, Bob did not complain of any pain until approximately 2:00 p.m., after the will was signed. (R.E. 5). Bob was also eating and drinking a little. (Tr. 204).

Contestants called Dr. Shumaker as an expert in oncology who was questioned about certain notes and notations in Bob's medical records. Contestants never asked Dr. Shumaker her opinions concerning Bob's mental status or capacity on the critical date of October 2, 2003 when Bob signed his will. However, when asked her opinions by counsel for Sammy and Sheila, Dr. Shumaker could not give any opinion as to Bob's mental capacity on October 2, 2003 at the time the will was signed and would defer to the nurses' assessment. (Tr. 229-30).

Sammy and Sheila called Nurse Corley Callum, a registered nurse who received a bachelor in nursing at the University of Mississippi Medical Center, who worked at Baptist in the oncology department as of October 2, 2003. Nurse Callum testified as follows:

1. Her duties and responsibilities in the oncology department were daily patient care, daily assessments of patients, and administration of chemotherapy. (Tr. 87).

2. She also performed mental status assessments on patients. (Tr. 87).

3. She agreed to be a witness to Bob executing his will and recalled going into Bob's room where he was seated on the bed with the will on a table in front of him. (Tr. 90, 96).

4. She had a conversation with Bob and asked how he was doing and verifying what was taking place (signing the will) was what he wanted to do. (Tr. 91).

5. She satisfied herself that this was Bob's wishes and that he did not appear to be under the influence of any drugs at the time. (Tr. 91).

6. She read the will as well as the affidavits prior to Bob signing the will. (Tr. 96, 99).

7. She satisfied herself that Bob was of sound and disposing mind and memory at the time he executed the will based upon the conversation she had with Bob and that she would not have signed her name to the will if she were not satisfied of this fact. (Tr. 99-100).

8. She further satisfied herself that the will represented the intent of Bob at the time he executed the will. (Tr. 110).

9. She testified that she would not sign her name to any document that she felt was deceitful and she made her own judgment of Bob's mental status based upon the questions she asked Bob. (Tr. 111).

10. She testified that she felt like she was upholding Bob's wishes. (Tr. 112).

This Court held in *Hayward v. Hayward,* 299 So. 2d 207 (Miss. 1974) it is at that crucial moment that ". . . evidence of testamentary capacity attains its maximum and controlling relevancy, that is, ***at the time of the will's execution, . . .***" *Hayward,* 299 So. 2d at 209-10 (Miss. 1974)(emphasis added).

Additionally, this Court has repeatedly held that "[t]he testimony of a subscribing witness is entitled to greater weight than that of witnesses who were not present at the time the instrument was executed or who did not see the test[ator] on that day. *In re Estate of Pigg,* 877 So. 2d 406, 411 (Miss. 2003), citing *In re Estate of Edwards,* 520 So. 2d 1370, 1373 (Miss. 1988). Nurse Callum's testimony is the most relevant and compelling testimony concerning Bob's testamentary and mental capacity at the time he executed the will. Nurse Callum is a registered nurse trained and experienced in performing physical and mental assessments, she spoke with Bob prior to signing the will, she satisfied herself that Bob knew what he was doing, she satisfied

herself that Bob understood what he was doing, she was satisfied that what was contained in the will was what Bob wanted, and she did not feel as if there was any deceit taking place, and she felt as though she was upholding Bob's wishes.

Contestants additionally point to the differences between Bob's signatures on September 29 and October 2 as an indication of Bob's lack of mental capacity. (See Appellants' Brief p 38-39). However, this contention fails because the contestants did not show that it was in fact Bob's signature on the admissions form. Sammy testified that he completed the admissions paperwork at Baptist on Bob's behalf because Bob was car sick and throwing up, and in addition, they were preparing Bob for a liver biopsy. (Tr. 406). Sammy further testified that the signature on the medical records could have been his. (Tr. 406). This is further supported by the fact that Sammy's name appears next to Bob's on the admission form relied on by the contestants.

Therefore, considering all the evidence in the light most favorable to the contestants, giving the contestants the benefit of all favorable inferences drawn from the evidence, reasonable jurors could not have arrived at a contrary verdict, and therefore, this Court should affirm the grant of a directed verdict in favor of Sammy and Sheila on the issue of testamentary capacity.

II. The Trial Court Properly Instructed The Jury.

The contestants assert that the Court must reverse and remand because of erroneous instructions given by the trial court. This Court has announced that "[i]t is well-settled law that an appellate court does not review jury instructions in isolation; instead, we consider them as a whole to determine if the jury was properly instructed on the law". *Milano v. State*, 790 So. 2d 179, 184 (Miss. 2001). "When read as a whole, ***if the instructions fairly announce the law of the***

case and create no injustice, no reversible error will be found." *Phillipson v. State*, 943 So. 2d 670, 671 (Miss. 2006)(emphasis added).

At the close of oral argument of contestants' motion for directed verdict on the issue of confidential relationship, the trial court announced the following:

> . . . Further, a beneficiary delivered the will for execution and apparently held it after execution until probate, and the will was executed within 12 hours of the testator's death. Clearly the active participation by the beneficiaries in the procurement, preparation and delivery of the will, to which the proponents testified themselves, fits squarely within the definition of confidential relationship as defined in the jury instructions submitted by the proponent and the contestant and in the case styled In Re Smith - - *In Re Estate of Smith*. . . . Such actions seem to invite a will contest, ***but whether the action of the proponents are sufficient to support a verdict of undue influence remains to be seen.*** . . . . For today, however, it's clearly appropriate that we submit the issue to the jury for a decision.
>
> (Tr. 434-35)(emphasis added).

The record in the present case reflects that Sammy and Sheila submitted 17 jury instructions, one of which was a proposed form of the verdict. (Tr. 437-52). Of the 17 jury instructions submitted to the trial court on behalf of Sammy and Sheila, 10 instructions were withdrawn (P1, P3-5, P7-10, P12, and P15), 1 was given as amended with no objection (P2), 4 were given with no objection (P6, P11, and P13-14), 1 was refused by the court after objection (P17), and 1 was given with objection (P16). The only jury instruction objected to by the contestants was P16, which was a peremptory instruction for Sammy and Sheila on the issue of testamentary capacity. (Tr. 451).

The record also reflects that the contestants submitted 17 jury instructions, one of which was the form of the verdict given by the trial court. (Tr. 442-48). Of contestants' 17 jury instructions, 8 were withdrawn (C2-3, C5-7, C10-11, and C16), 7 were given without objection (C4, C8, C12-15, and C17), and 2 were refused after objection by Sammy and Sheila (C1 and

C9). Both were peremptory, with C9 being peremptory on the issue of confidential relationship.

Of the 6 jury instructions submitted by Sammy and Sheila, instruction P6 contained the substantive law of the case. Instruction number P6 is important from the standpoint that it instructs the jury on the issue of confidential relationship and the presumption of undue influence, and the burden of proof placed on Sammy and Sheila to overcome the presumption of undue influence (i.e. clear and convincing evidence). Also, just as important are contestants' jury instructions C8 and C15. Jury instruction C8 states the following:

> The Court instructs the jury that clear and convincing evidence is that proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Clear and convincing proof will be shown where the truth of the facts asserted is highly probably. It is proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.

Jury instruction C15 states the following:

> ". . . should you find that at the time of the execution of the purported Last Will and testament of Robert Noblin, deceased, that Sammy Burgess and/or Sheila McDill exerted undue influence upon Robert Noblin, then it is your sworn duty to find for Ronnie Noblin and the other contestants.

When jury instruction P6 was presented to the trail court during the jury instruction conference, contestants did not object to the instruction and stated that ". . . we have an instruction that we've submitted that is - - I haven't compared them word for word, but they're very, very similar." (Tr. 440).

It is well settled in Mississippi that when an allegation of undue influence is raised in a will contest, "[t]he proponents still have the burden to prove that the will was the product of the free will of the testatrix . . . it [is] incumbent upon the proponents, ***by a preponderance of the evidence,*** to reasonably satisfy the mind of the jury that the instrument was, in truth, the last will of the deceased." *In re Estate of Pigg,* 877 So. 2d 406, 413 (Miss. Ct. App. 2003)(emphasis added).

Contestants assert that the failure to grant a peremptory instruction on the issue of

confidential relationship was prejudicial error due to the fact there was ". . . no way to know whether the jury even reached the proposition submitted by the Court that Sammy and Sheila could overcome the presumption of undue influence only by clear and convincing evidence." (Appellants' Brief p. 32). This argument fails due to the fact that, when reading instruction P6 together with instructions C8 and C15, the jury was required and had no choice but to determine whether Sammy and Sheila, from the clear and convincing evidence, did not exert undue influence on Bob. A peremptory instruction on the issue of confidential relationship has the effect of increasing Sammy and Sheila's existing burden of proof on the issue of undue influence from a preponderance standard to that of a clear and convincing standard. This is exactly what the trial court instructed the jury to determine, whether Sammy and Sheila showed from the clear and convincing evidence they did not exert undue influence over Bob. The trial court never instructed the jury that Sammy and Sheila's existing burden of proof was by a preponderance of the evidence, they were instructed that the standard of proof on Sammy and Sheila was the clear and convincing standard.

There is no question that the jury was instructed that Sammy and Sheila had the burden of proof throughout the trial to show, through the clear and convincing evidence, they did not exert undue influence on Bob. One only need look at contestant's closing argument when Mr. Gene Tullos stated the following:

> And in this case, this is a civil case. But the burden of proof is much greater upon the proponents in this case than it would be in the normal case. Judge Evans has told you they [Sammy and Sheila] have to prove their case by clear and convincing evidence, and that's almost as much as in a capital murder case beyond a reasonable doubt. Not quite, but almost as much. . . . So, members of the jury, when you go back to the jury room, you just think about all of these things and think about the tremendous burden of proof that's upon them [Sammy and Sheila], not upon us [contestants], and on behalf of the Noblin heirs, I beg you to return a verdict for them.

(Tr. 458, 462-63).

In addition, jury instruction P14 instructed the jury ". . . that all the instructions given by the Court must be read and considered together by the Jury in reaching its verdict." Taken as a whole, the jury instructions clearly announce the law that is applicable in the present case. The record is bare of anything to indicate that the jury did not follow the trial court's instructions, nor did contestants object to any of the jury instructions submitted with the exception of instruction P16, which was a peremptory instruction on the issue of Bob's testamentary capacity.

The contestants complain that the verdict returned was a general one and that "[t]here is no way to know whether the jury decided the case on the erroneous premise – in contradiction of the undisputed evidence - - that a confidential relationship did not exist." (Appellants' Brief, p. 32). However, this argument is without merit based upon the argument above stated, and also due to the fact that it was the contestants' instruction outlining the form of the verdict that was submitted to the jury. Furthermore, there was no objection raised concerning the form of the verdict. In addition, this is the first time contestants have raised this issue as it was not contained in their post trial motion. In *Conely v. State*, 790 So. 2d 773 (2001), the Court held that "[o]bjections to jury instructions made after the jury has returned a verdict and been discharged is simply too late." *Conely v. State,* 790 So. 2d 773, 802 (Miss. 2001)(citing *Pinkney v. State,* 538 So. 2d 329, 346 (Miss. 1988).

III. Sammy And Sheila Overcame Their Burden Of Proof By Clear and Convincing Evidence That They Did Not Exert Undue Influence On Bob.

As previously stated, it is well settled in Mississippi that when an allegation of undue influence is raised in a will contest, "[t]he proponents still have the burden to prove that the will was the product of the free will of the testatrix . . . it [is] incumbent upon the proponents . . . to reasonably satisfy the mind of the jury that the instrument was, in truth, the last will of the

deceased." *In re Estate of Pigg,* 877 So. 2d 406, 413 (Miss. Ct. App. 2003).

Additionally, "[i]n an action contesting a will, a presumption of undue influence arises where there is a confidential or fiduciary relationship." *Pallatin v. Jones,* 638 So. 2d 493, 495 (Miss. 1994)(citing *Mullins v. Ratcliff,* 515 So. 2d 1183, 1192 (Miss. 1987). Thus, Sammy and Sheila were shouldered with the burden of proving by the clear and convincing evidence that they did not exert undue influence on Bob.

The Court has adopted a three- pronged test that states: in order for the proponent of a will to overcome a presumption of undue influence, it must be ". . . shown by clear and convincing evidence that (A) [proponent] exhibited good faith in the fiduciary relationship with [testator]; (B) [testator] acted with knowledge and deliberation when he executed the . . . will; and (C) [testator] exhibited independent consent and action." *Pallatin v. Jones,* 638 So. 2d at 495, citing *Murray v. Laird,* 446 So. 2d 575, 578 (Miss. 1984).

In *Vega v. Estate of Mullen,* 583 So. 2d 1259 (Miss. 1991) the Court stated the following concerning the three-pronged test outlined above:

> the three-pronged test . . . should not be understood as entirely separate and independent requirements that ought be rigidly exacted in every case. Undue influence is a practical, non-technical conception, a common sense notion of human behavior ... common sense counsels against rigid, inflexible multi-part tests, particularly as the parties our law saddles with proof of the negatives are laymen, not legal technicians.
>
> *Vega v. Estate of Mullen,* 583 So. 2d 1259, 1265 (Miss. 1991), citing *Mullins v. Ratcliff,* 515 So. 2d 1183, 1194 (Miss. 1987).

A. Good Faith

In *Pallatin,* the following factors were outlined by the Court to consider in determining whether the proponent of a will acted in good faith:

1. The identity of the initiating party;

2. The place of the execution of the will and the persons in whose presence the will was executed;

3. The fee that was paid;

4. The identity of the person who paid the fee; and

5. The secrecy and openness given the execution of the will.

Pallatin, 638 So. 2d at 494-95.

The facts in *Pallatin* are somewhat similar to those in the present case. In *Pallatin,* one of the beneficiaries and proponent to the will contacted the attorney, actively participated in the procurement and preparation of the testator's will, there was no communication between the testator and attorney, delivered the will from the attorney to the testator, was in the hospital room when testator executed the will, and took possession of the will once it was signed. *Id.*

In the present case, Bob requested that Sammy contact the attorney, Todd Sorey, for the purpose of preparing a will. (Tr. 395, 423). It is not disputed that Sammy called Todd on Bob's behalf. The call was made on Sammy's cell phone from Bob's hospital room and Sammy relayed Todd's questions to Bob because Bob was hard of hearing over the phone. (Tr. 125, 178). Todd, having being familiar with and identifying Bob's voice, prepared Bob's will according to Bob's responses. (Tr. 125-26). Sheila picked the will up from Todd's office on October 2, 2003 and took it to Bob's hospital room for his signature. (Tr. 182).

In *Pallatin,* a subscribing witness testified that testator was a very good communicator and a very adamant individual, and when the witness asked testator if that was his will and if he wanted her to sign it, he nodded yes and pointed to the area where she needed to sign. The Court in *Pallatin,* citing *Vega v. Estate of Muller,* 583 So. 2d 1259

(Miss. 1991), stated the following:

> In those cases where you . . . have a confidential relations transfer from a dependent to a dominant party, it seems . . . that the ultimate test should be something on the order of the following: Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence, ***either from the circumstances, or from a totally disinterested witness from which the court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor?"***
>
> *Pallatin,* 638 So. 2d at 495, citing *Vega v. Estate of Muller,* 583 So. 2d 1259, 1275 (Miss. 1991)(emphasis added).

In the present case, Nurse Callum, a totally disinterested witness, testified that Bob understood what he was doing and that he wanted to sign the will. (Tr. 91). Nurse Callum further satisfied herself that the will represented the intent of Bob at the time he signed the will, and that she was upholding Bob's wishes. (Tr. 110, 112).

The second factor to consider is the place of the execution of the will and the persons in whose presence the will was executed. It is not disputed that Bob signed his will in his hospital room at Baptist in the presence of two subscribing witnesses who were medical personnel, along with Gail Young, who worked in the business office at Baptist. Sammy and Sheila were also present in the room. Similar facts are present in *Pallatin,* where the testator signed his will in his hospital room at Keesler Medical Center in the presence of one of the principal beneficiaries and the two subscribing witnesses who were medical personnel. *Id.* at 496.

The third and fourth factors are the consideration/fee that was paid and the identity of the person who paid the fee.

In *Pallatin,* the fee was paid out of testator's conservatorship account by the proponent on testator's behalf. *Id.* In the present case, attorney Todd Sorey testified that he would have sent the bill to Bob to pay, but he never sent the bill and was never paid for the will because Bob

had died.

The fifth and last factor to consider to determine the good faith of Sammy and Sheila is the secrecy and openness of the execution of the will. In *Pallatin*, the will was executed at Keesler Medical Center in testator's hospital room in the intensive care unit in the presence of two subscribing witnesses and one of the beneficiaries. The Court found that this was ". . . quiet open and well observed, ..." *Id.* Likewise, Bob signed his will in his hospital room in the presence of the two subscribing witnesses and a notary, all employees of Baptist. There was nothing secret or covert surrounding the signing of Bob's will.

Therefore, the clear and convincing evidence supports the finding that Sammy and Sheila acted in good faith.

B. Knowledge and Deliberation

The following four factors are to be considered in determining a testator's knowledge and deliberation at the time that the will was executed:

1. His awareness of his total assets and their general value;

2. An understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect the prior will or natural distribution;

3. Whether non-relative beneficiaries would be excluded or included; and

4. Knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor/testator on him and how susceptible to his influence.

Pallatin, 638 So. 2d at 494-95. See also *Murray v. Laird*, 446 So. 2d 575, 579 (Miss. 1984).

The first and fourth factors are similar and will be discussed together. Bob remained in complete control of his finances, including all of his bank accounts and payment of all of his bills. (Tr. 161, 178). Bob was a very independent person, who has been described by one of the

contestants as "one-way Bob", it was his way or no way. (Tr. 281). The record is clear that Bob understood what property he owned and their estimated value. Nurse Callum's testimony supports this assertion.

The second factor to consider is Bob's understanding of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect the prior will or natural distribution. The third factor to consider is whether non-relative beneficiaries would be excluded or included. For purposes of brevity, as well as the fact that these two factors are similar, they will be discussed together.

According to the testimony of the contestants, Henry Clay Noblin, Jr., Dianne Boykin, and Ronnie Noblin, Bob's natural inheritors under the laws of descent and distribution are as follows:

	Name	**Relation**	
1.	Sue Noblin	Aunt	
2.	Nancy Chambers	1st cousin	
3.	Henry Clay Noblin, Jr.	1st cousin	
4.	Thomas Noblin	Uncle	
5.	Casey Miller	2nd cousin	
6.	Billy Joe Miller	2nd cousin	
7.	Dianne Boykin	1st cousin	
8.	Janet Sue Noblin	1st cousin	
9.	Jim Alford	1st cousin	
10.	Mark Noblin	1st cousin	
11.	Glenn Noblin	1st cousin	
12.	Mary Ann _____	1st cousin	(last name unknown)
13.	Robert Noblin	1st cousin	
14.	Bo Noblin	1st cousin	
15.	Pam _____	1st cousin	(last name unknown)
16.	Debbie _____	1st cousin	(last name unknown)
17.	Robbie Noblin	1st cousin	
18.	Nell Noblin Johnson	1st cousin	
19.	Billy Noblin	1st cousin	
20.	Heirs of Bess Herring ____	Unknown	(no names are known)
21.	Heirs of Bama Herring _____	Unknown	(no names are known)

(Tr. 270-73, 284-90, 411-15).

According to the testimony of the three contestants that testified, Bob had at least 21 heirs that would inherit his estate through the laws of descent and distribution. These heirs lived in West Virginia, Georgia, Virginia, Alabama, Tennessee, Mississippi, Kansas, Texas, and California. (Tr. 270-73, 284-90, 411-15). Some of these heirs had been living out of the State of Mississippi for more than sixty one years. (Tr. 233). The contestants, being of the same or similar kinship to all of the heirs of Bob with the exception of the Herring heirs, could not recall the names of most of their kinfolk, nor could they tell the court how many there were. (Tr. 270-73, 284-90, 411-15).

This testimony is important from the standpoint that the contestants allege that this was "Noblin land" and that "Bob Noblin had long been aware of the result of dying intestate, particularly that heirs at law would inherit the 'family farm.'" (See Appellants' Brief, p. 2, where Appellants' cite Tr. 239-40, 279). While counsel is unable to find this assertion in the transcript, Sammy and Sheila agree that Bob Noblin, once he knew there was no hope of recovery, realized that his heirs at law would inherit his land, and there was absolutely no way Bob would have allowed his heirs, especially these contestants, to inherit "Bob Noblin land."

The contestant, Henry Clary Noblin, testified on direct examination that Bob was an "independent, loaner, off to his self fellow, did his own work." (Tr. 237). Henry Clay Noblin further testified that Bob had approximately 500 acres of land in Smith County and Scott County, and that Bob had received his property through inheritance. (Tr. 240). However, when presented with a copy of Bob's deeds during cross examinaton, Henry Clay Noblin stated that he didn't know anything about the land or whether Bob still owned the land or not. (Tr. 247). The record is clear that Bob Noblin had purchased his land and had not inherited it from the

Noblin family. Furthermore, the record is clear that Henry Clay Noblin and his sister, Nancy Chambers, own approximately 460 acres land that was and is considered "Noblin land," and that Henry Clay Noblin's father had sued Bob Noblin in 1977 over this land. As a result of the 1977 lawsuit, Bob received 1.75 acres of the 460 acres of "Noblin land." (Tr. 262; R.E. 1, 2). Henry Clay Noblin testified that he helped Bob with his cattle, putting up hay, and fencing. (Tr. 238). However, Joe Rigby, Scott County Circuit Clerk, testified that for the last 10 to 15 years he was with Bob and Sammy down on Bob's land two or three times a week and never once saw Henry Clay Noblin. (Tr. 372, 374).

The contestant, Diane Boykin, testified that this "Noblin land" had been in the Noblin family since 1838, and that she even had papers in her car that stated that. (Tr. 279). While Diane Boykin's reverence to "Noblin land" and the "family farm" are well and good, it appears that it only applies to "Bob Noblin land" due to the fact that Boykin, her brother and her sisters sold their father's land and home, or "Noblin land" and the "family farm" several months after his death. (Tr. 416; R.E. 7). Diane Boykin further testified that Bob would never refer to Sammy and Sheila as his son and daughter, although Bob had referred to them as his son and daughter as far back as 1989, and had even referred them as such in his will. (Tr. 291). Additionally, according to Diane Boykin's testimony, her relationship with Bob is better described as a social acquaintance than that of a cousin. (Tr. 277).

The contestant, Ronnie Noblin, testified that he shared his sister, Diane Boykin's, pride and fondness for Noblin land. (Tr. 410). However, Ronnie Noblin's pride in Noblin land appears to also only apply to "Bob Noblin land", due to the fact that he joined in with his sisters and sold his father's home and land shortly after his death. (Tr. 416).

None of the other contestants testified.

David Gainey was called as a witness on behalf of Sammy and Sheila. David testified that he had known Bob for most of his life. (Tr. 327). David testified that Bob was a "unique, very conservative type person." (Tr. 331). David had been with Bob and Sammy on Bob's land on many, many occasions and that Bob and Sammy's relationship was no different than a father and son. (Tr. 334). David had never seen any of the contestants on Bob's land. (Tr. 335).

Joe Rigby, Scott County Circuit Clerk, had known Bob since 1974. (Tr. 368). Joe described Bob as the kind of person that stayed to himself and took care of Bob. (Tr. 368). For 10 to 15 years prior to Bob's death, Joe would be with Sammy and Bob down on Bob's land at least 2 to 3 times a week working with Bob and Sammy on several projects. (Tr. 372). Joe described Bob and Sammy's relationship as being like a father and son. (Tr. 372).

Bob Noblin knew exactly who his natural heirs were and what kind of people they were. All of their testimony consisted of nothing more than self serving and gratuitous falsehoods, with the exception of their names and where they lived. These 7 contestants had nothing to do with Bob during his lifetime other than saying "howdy" in passing, but they came out of the woodwork once Bob died to lay claim to "Bob Noblin land".

Bob Noblin also knew who Sammy and Sheila were and what kind of people they were. While they might not have been his natural son and daughter, they were his family. They were the family Bob celebrated birthdays, graduations, Father's Day, Christmas, and Thanksgiving with. (Tr. 421-22). Bob didn't keep his relationship with Sammy and Sheila secret because Bob named them as his son and daughter on his IRA applications and his will. Better still, Bob ensured that his final resting place would be a testament to his relationship with Sammy and Sheila when he had "Father" carved in stone above his name on his tombstone. (Tr. 359; R.E. 4).

It is interesting to note and should be pointed out to this Court that the contestants who did testify indicated or implied that Bob wanted this land to stay in the Noblin family. If that were true, then it would have been necessary for Bob to have a will specifically for that purpose to ensure that none of the Herring heirs inherited the land through descent and distribution.

C. Independent Consent and Action.

In *Murray v. Laird,* 446 So. 2d 575 (Miss. 1984), the Court required a showing that the testator receive advice from an independent competent person. After *Murray,* however, the Court has made this test less rigid and modified this factor by eliminating the requirement that the testator receive advice from an independent competent person. See *Mullins v. Ratcliff,* 515 So. 2d 1183, 1193 (Miss. 1987). "Now, rather than requiring the independent advice of a competent person, the Court requires a showing of grantors 'independent consent and action' ***based on all of the surrounding facts and circumstances.***" *Vega v. Estate of Mullen,* 583 So. 2d 1259, 1264 (Miss. 1991).

In the present case, it is undisputed that Bob referred to Sammy and Sheila as his son and daughter. It is undisputed that Bob's relationship with Sammy and Sheila was liken to a father. It is undisputed that Nurse Corley Callum, a totally disinterested witness, satisfied herself that Bob understood what he was doing and that he wanted to sign the will; satisfied herself that the will represented the intent of Bob at the time he signed the will; and that she was upholding Bob's wishes.

Based upon the testimony contained in the record, Sammy and Sheila have shown through the monumental, substantial, overwhelming, and clear and convincing evidence that the will Bob signed on October 2, 2003 was Bob's true, untampered, and genuine will.

CONCLUSION

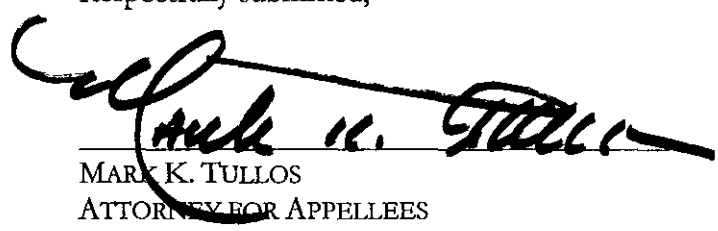
The learned trial judge carefully considered all of the evidence submitted by Sammy and Sheila on the issue of testamentary capacity; was mindful that Sammy and Sheila carried the burden of proof on this issue throughout the trial; considered the evidence brought forward by the contestants; and considered argument of counsel as well as the case law, and determined that there was no triable issue of fact to present to the jury on the issue of testamentary capacity.

Furthermore, the trial court properly instructed the jury on the issue of undue influence. Contestants argue that the trial court's failure to grant a peremptory instruction on the issue of confidential relationship was prejudicial error. However, jury instructions P6, C8 and C15 required the jury to decide whether Sammy and Sheila exerted any undue influence on Bob, whether presumptive or otherwise, from the clear and convincing standard outlined in instructions P6 and C8. Although the form of the verdict was general, there is nothing to indicate that the jury did not follow the trial court's instructions.

Lastly, Sammy and Sheila satisfied the three-prong test adopted by this Court by proving through clear and convincing evidence that they did not exert undue influence on Bob. Sammy and Sheila were able to prove they acted in good faith; that Bob acted with knowledge and deliberation when he executed his will; and that Bob exhibited independent consent and action.

Therefore, this Court should affirm the verdict in favor of Sammy and Sheila in all respects.

Respectfully submitted,



MARK K. TULLOS
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I, Mark K. Tullos, attorney for the Appellees, do hereby certify that I have this date filed the original and three (3) copies of the above and foregoing **BRIEF FOR THE APPELLEES, SAMMY J. BURGESS AND SHEILA MCDILL** with the Clerk of the Supreme Court; and have mailed, by U. S. Mail, postage prepaid, and true and correct copy of same to the following:

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